United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

76-1109

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P/S

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 76-1109

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

PASQUALE INTRIERI,
Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK.

REPLY BRIEF FOR THE DEFENDANT-APPELLANT

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This reply brief of the Appellant is specifically directed to allegations in Appellee's brief which the Appellant claims are not supported by the evidence or are negated by contrary evidence. In those instances where the Appellant contends that there exists, in the trial transcript, evidence contrary to Appellee's allegations, specific pages of the trial transcript (T.T.) shall be referred to.

1. The Appellee alleges that during one of the taxable years embraced by the indictment, the Appellant "provided support for four children of his brother" (page 2 of Appellee's brief). This is a misleading statement, since the Expenditure Sheet introduced into evidence by the Appellee merely reflected a gift from the Appellant to his brother for that taxable year in the total amount of $1,000.00.

2. The Appellee claims as fact that in 1969 the Appellant expended $44,731.73 to provide housing for his brother, his brother's family, and his mother (page 2 of Appellee's brief). This statement, however, was actually a conclusion by the Appellee with regard to the ultimate finding by the jury; since although the Appellee attempted to discredit testimony of Appellant's mother, Mrs. LaManda, that this expenditure had been made by her with funds received from her deceased husband, there was no evidence, direct or indirect, linking this expenditure to the Appellant.

3. The Appellee claims that the divorce which occurred in 1968 between the Appellant and his first wife, Joan Intrieri, was "financially disastrous and that said Joan Intrieri did receive control of substantially all of Lt. Intrieri's assets" (page 2 of Appellee's brief). However, on direct examination, Joan Intrieri testified that she didn't know whether or not the Appellant kept large sums of cash in their home; and that she knew that some bank accounts had been left to the Appellant by his grandmother. (T.T. 96-97). Moreover, on cross-examination, Joan Intrieri, when questioned regarding her knowledge of any cash available to the Appellant, testified that "I know he had the house, I don't know what else he had...I don't know whatever he had or hadn't, the only thing I knew was the house." (T.T. 114)

4. The Appellee makes reference to alleged rampart corruption on the New York City Police Department and contends that the Appellant "orchestrated" and "offered" an explanation that the money in question was provided by his relatives. (page 3

of Appellant's brief). The Appellee did state to the trial court its intention of offering testimony with regard to the opportunity of the Appellant receiving "graft" money. The Appellant, however, objected to this anticipated testimony, citing various cases to the trial court including, but not limited to, United States v. Massie, 755 U.S. 595, 78 S.Ct. 495, objecting to such anticipated evidence in the absence of any connection with the Appellant. The Appellee states its intention of making "an offer of proof at the proper time" but never did and consequently, the record is completely barren of any evidence even suggesting the illegal receipt by the Appellant of monies while a member of the New York City Police Department. (T.T. 782 and 783) There were no "explanations" offered by the Appellant for no statement was ever given by him to any prosecuting authorities. The Appellant's relatives (his mother, mother-in-law, and brother) were called before the Grand Jury and called as prosecution witnesses solely for the purpose of attacking their credibility. The Appellant contends that his counsel's opening statement does not constitute evidence and can therefore not be relied upon by the Appellee as a predicate for its conclusion that the Appellant "adopted" the testimony of his relatives by exercising his constitutional right not to testify in his own behalf.

5. The Appellant takes issue with the claim of the Appellee that it has amply satisfied its burden of establishing

with reasonable certainty that the Appellant's expenditures in the years in question, 1968 through 1971, were not the product of assets which the Appellant had earned in prior years and had available to him. The Appellee, therefore, takes no issue with the case law submitted by the Appellant relative to what is legally necessary to establish a "starting point" for purposes of an income tax prosecution based upon a cash expenditures theory. In footnote 6, page 18 of Appellee's brief, it is claimed that Appellant's income tax returns prior to 1967 "were no longer available." In a further attempt to explain the absence of these returns (prior to 1967), which the Appellant claims were necessary to establish a starting point with a reasonable degree of certainty, the Appellee points out that Part 9, Section 9327.1(4) of the Internal Revenue Manual recommends "only that available returns for the five years prior to 1967 be examined." On the contrary, however, said section states that, for purposes of the instant prosecution, the Appellant's filing record and copies of available income tax returns <u>should be furnished</u> for <u>at least</u> five years preceding and all years subsequent to the starting point to furnish additional support to said starting point. This section further states that "in the event that any of the required returns are not available, and if the amount of income reported on such returns cannot be determined from other sources, the appropriate District Director's Office should be requested to furnish a listing of the amounts of income tax paid (including payments with estimates). A computation will then be made based on the tax paid to determine the maximum net income which could have

appeared on the return. Prior reports bearing upon the matter should be examined for useful information."

In the instant case, it is respectfully submitted that the Appellee:

a. introduced no evidence supporting its conclusion that Appellant's income tax returns for five years preceding 1967 were "unavailable";

b. no returns subsequent to 1971, which were certainly available covering the years 1972 through 1974, were introduced for additional support to establish the necessary starting point;

c. assuming arguendo that the Appellant's returns prior to 1967 were in fact unavailable, there was no listing furnished by the District Director's Office reflecting the amounts of income tax paid by the Appellant for years prior to 1967 or subsequent to 1971.

This, the Appellant contends, is substantial evidentiary support of the Appellee's failure to establish the necessary starting point with the required reasonable degree of certainty. Indeed, the only evidence which in any way had any bearing upon a starting point was the Appellant's return for 1967 (which, for this purpose, was equivocal at best) and the vague testimony of Joan Intrieri to the effect that she had no knowledge of any assets available to the Appellant as of December 31, 1967.

6. Tangentially, the Appellant contends that the Appellee failed to meet its burden of proof beyond a reasonable doubt that any alleged income expended by the Appellant from 1968 to 1971, had been in fact received by him during those calendar years, as distinguished from having been received any time priot to December 31, 1967.

7. The Appellee states repetitively that it fulfilled its duty of negating leads supplied by the Appellant (page 16 of Appellee's brief). The trial transcript, however, unequivocably reflects that there existed no leads supplied by the Appellant which the Appellee was required to negate pursuant to United States v. Holland, 348 U.S. 121 (1954). The Appellee would have it both ways: it sought to negate explanations of cash expenditures offered by persons other than the Appellant, but did not negate the legally recognized defense theory that the non-reported income allegedly expended by the Appellant during the calendar years 1968 through 1971 had actually been received by him during that period. If income tax prosecutions were to be predicated upon the knowledge, or lack thereof, of a defendant's wife of his financial assets during their marriage, this offense would permeate the dockets of every Federal court. The "determined and exhaustive effort undertaken to discover any possible assets" of the Appellant (page 17 of Appellee's brief) should have consisted of compliance with Part 9, Section 9327.1(4) of the Internal Revenue Manual, adherence to which by the Appellee was completely lacking in the instant trial.

8. Appellee's statement that the Appellant "was offered the opportunity to testify personally before the Grand Jury prior to his indictment, but refused to do so" (page 20 of Appellee's brief) has absolutely no support in the trial transcript. The fact of the matter is that Appellant did indeed meet with the Prosecutor with

regard to the instant indictments, but the initial quewtions posed to him were completely unrelated thereto, causing the termination of this interview. This also does not appear of record, but is respectfully brought before this Court in response to the contention of the Appellee.

9. The Appellee contends that it effectively negated the testimony of the Appellant's mother, mother-in-law and brother. Assuming arguendo this to be the case, there still exists an absence of evidence linking the expenditures in question with the Appellant himself. This necessary bridge was never built, let alone crossed.

* * * *

CONCLUSION

This reply brief has devoted itself exclusively to the related two-fold issue of whether or not the Appellee established with reasonable certainty the necessary starting point and whether or not the Appellee proved beyond a reasonable doubt that monies allegedly non-reported and expended by the Appellant during the years 1968 through 1971 were in fact received by him during that period. At time of oral argument the Appellant, by his counsel, shall address himself to the other issues formulated by the instant appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, GERALD ALCH, hereby certify that two copies of the attached reply brief of Appellant Pasquale Intrieri have been served upon David G. Trager, United States Attorney for the Eastern District of New York this date, by mailing said copies to his offices located at 225 Cadman Plaza East, Brooklyn, New York 11201.

GERALD ALCH

Dated: Boston, Massachusetts
June 22, 1976